

**BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
OF THE STATE OF KANSAS**

Kansas State School for the Blind, )  
Kansas State School for the Deaf, )  
    Petitioners, )  
  ) )  
  ) )  
v. ) )  
  ) )  
Kansas Organization of State Employees )  
(KOSE) )  
    Respondent )

Case No.: 75-UCA-3-2008  
Case No.: 75-UCA-4-2008

**ORDER ON PETITIONERS' AND RESPONDENT'S  
MOTIONS FOR SUMMARY JUDGMENT**

NOW, on this 15th day of May, 2009, Petitioner's, Kansas State Board of Education on behalf of the Kansas State School for the Blind and the Kansas State School for the Deaf (KSSB and KSSD), Motion for Summary Judgment and the Respondent's, Kansas Organization of State Employees (KOSE), Motion for Summary Judgment came on for consideration before presiding officer Douglas A. Hager in the above-captioned matter.

**APPEARANCES**

Petitioners KSSB and KSSD appear through counsel, Dan Biles, of Gates, Biles & Shields, P.A. On March 6, 2008, Dan Biles withdrew as counsel of record for the Petitioners, and Steven R. Smith of Gates, Shields & Ferguson entered his appearance on their behalf. Respondent KOSE appears through counsel, Rebecca Proctor and James R. "Dick" Waers, Blake & Uhlig, P.A.

## PROCEEDINGS

On May 15, 2008, separate *Petitions for Clarification or Amendment of Appropriate Unit* were filed with the Public Employee Relations Board (PERB) by Petitioners KSSB and KSSD. These petitions were assigned case numbers 75-UCA-3-2008 and 75-UCA-4-2008, respectively. Petitioners seek to amend the July 13, 2007 unit determination in PERB Case No. 75-UD-1-2007. Petitioners' memoranda in support stated that:

"The State Board of Education, on behalf of the Kansas State School for the Blind (KSSB) comes before the Public Employee Relations Board (PERB) seeking to amend the bargaining unit composition, which currently combines KSSB's teaching employees into bargaining units with administrative support staff, social workers, and counselors. Pursuant to K.S.A. 76-1101a, KSSB is under the control and supervision of the State Board of Education. As the controlling authority for KSSB, the State Board of Education petitions PERB to remove KSSB's teaching employees from the current bargaining units."

In the statewide realignment of public employee units of the State of Kansas and its agencies, 42 non-Regents' PERB units were consolidated into 17 units. The effect of this PERB-ordered unit realignment upon the KSSB was to place the KSSB positions of Teacher, Activity Coordinator and Social Worker into the newly established statewide unit of Social Services, Counseling and Teachers. The KSSB position classifications of Instructional Assistant and Teacher Aide were combined with the newly established Administrative Unit.

In the memorandum in support of the petition for KSSD in 75-UCA-4-2008, an almost identical set of facts were presented. In both memoranda of support, the Petitioners put forward two primary reasons for removing the instructional-related positions from the state's realigned units. First, the teaching employees from KSSB and KSSD are alleged not to fall under the jurisdiction of the Kansas Public Employer-Employee Relations Act, (PEERA), at K.S.A. 75-4321 *et seq.* These positions, according to Petitioners, are covered under the provisions of the

Professional Negotiations Act, K.S.A. 72-5413 *et seq.* The second reason given for this proposed unit clarification or amendment is that "these groups of employees do not qualify as appropriate units using the standards articulated by the legislature and applied by PERB."

Also submitted with both the Unit Clarification or Amendment petitions for KSSB and KSSD was a *Motion To Stay Implementation of Memorandum of Agreement*. The memorandum of agreement (MOA) which included teaching related positions from KSSB and KSSD was negotiated by a group of state agency representatives headed by a representative from the Department of Administration, (D of A), with a team of individuals appointed by Kansas Organization of State Employees, (KOSE), who is certified by PERB as the bargaining representative for the units in question. The effective date of the MOA was May 18, 2008.

The *Motion To Stay Implementation of Memorandum of Agreement*, brought by the State Board of Education on behalf of KSSB and KSSD, contends that these teaching employees do not fall under PEERA "because they are exempted from the definition of public employee in K.S.A. 75-4322(a)." As an alternative argument, the Board of Education contends that their institutions' teaching-related positions do not constitute appropriate bargaining units when placed into PERB Unit 2 (Administrative Support) and PERB Unit 4 (Social Services, Counseling and Teachers). The negative impact upon the institutions' budgets because of additional costs related to the terms of the MOA and the problems related to the renewal of teaching employee contracts was cited as the critical problems necessitating the *Motion To Stay*. As a result, "[t]o avoid irreparable harm, the State Board of Education, on behalf of KSSB, respectfully requests PERB to issue an immediate order staying the implementation of the KOSE MOA for teaching employees at the Kansas School for the Blind pending its final decision on the

Petition for Clarification or Amendment of Appropriate Unit.” A similar Motion to Stay was included in the Unit Clarification or Amendment petition for KSSD.

On June 4, 2008, Respondent KOSE submitted its *Opposition to Petitioner's Motion to Stay Implementation of Memorandum of Agreement and Opposition to Petition for Clarification of Amendment of Appropriate Unit*. With respect to the Petitioners' contention that KSSB and KSSD teaching employees are covered under the PNA and not PEERA, the Respondent argues that these employees are not “professional employees of school districts” but rather fall under PEERA's definition of “public employees”, K.S.A. 75-4322(a), because they are employed by a state agency and not a school district.

In response to the Petitioner's assertion that the KSSB and KSSD employees were inappropriately included in the PERB ordered realigned units, the Respondent notes that “PERB has consistently interpreted PEERA to require only ‘an appropriate unit’ rather than the ‘most appropriate’ unit.” (*See Opposition to Petitioner's Motion to Stay, etc.*, p. 5)

Petitioners' *Response to Kansas Organization of State Employees' Answer in Opposition To Petition* was received on July 23, 2008. In reply, Petitioner suggests that. “[t]he legislature has not provided a consistent definition for the term ‘school district’.” *See Response to KOSE* at p. 5. In summary, the Petitioner concludes that,

“The term ‘school district’, though undefined by the legislature, has been used broadly to refer to public schools. KSSB is a public school, and therefore qualifies as a school district as the term is used in defining a professional employee subject to the Professional Negotiations Act.”

At this point in the proceedings, a telephone conference call was scheduled by this presiding officer for August 15, 2008 for both cases. The possibility of a mediated settlement of the issues in this case was explored with the parties. Consolidation of the two

unit clarification or amendment cases was also determined to be appropriate. Copies of the Prehearing questionnaires were then distributed to the parties and subsequently returned to PERB by August 25, 2008.

A prehearing telephone conference was held on August 27, 2008. During the call, the following deadlines were established: November 14, 2008 as the deadline for dispositive motions; December 12, 2008 as the response deadline for dispositive motions; February 13, 2009 as the final exchange of witness and exhibit lists; and February 24 through 26 as hearing dates. *See Prehearing Conference Order*, dated September 12, 2008.

#### MOTIONS TO DISMISS

The *Petitioner's Motion for Summary Judgment* and the *Respondent's Motion for Summary Judgment* were received by PERB on November 14, 2009. Petitioner and Respondent both stated in their respective motions that there are no material facts in dispute and that a judgment may be made as a matter of law. *See Petitioner's Motion for Summary Judgment*, at p. 21 and *Respondent's Motion of Summary Judgment*, at p. 1. *Petitioners' Response to Respondent's Motion for Summary Judgment* was filed with PERB on December 12, 2008. *Respondent's Brief in Response to Petitioner's Motion for Summary Judgment* was received by PERB on December 15, 2008.

The presiding officer took the petition, motions and responsive pleadings under advisement and researched the parties' respective legal arguments. Subsequently, the presiding officer considered this matter to be ripe for determination and prepared for issuance of a dispositive order. Thereafter, the presiding officer advised the parties by letter dated February

18, 2009, that the hearing scheduled for February 24 and 25, 2009 had been continued to allow for issuance of an order on the pending motions for summary judgment.

However, on April 23, 2009, Petitioner Board of Education filed a *Supplemental Memorandum in Support of the Petitioner's Motion for Summary Judgment* "[t]o advise the Respondent and the Hearing Officer of a change in the relevant statutory law which has occurred since briefing of the pending cross-motions for summary judgment was completed." Attached to the *Supplemental Memorandum* were an enrolled copy of Senate Bill No 290 and a legislative tracking summary indicating that the bill was approved by the Governor on April 8, 2008. The amendment to the Professional Negotiations Act, K.S.A. 72-5413 *et seq.* (PNA), is highlighted as follows:

*72-5413 (b) "Board of education" means the state board of education pursuant to its authority under K.S.A. 76-1001a and 76-1101a, and amendments thereto, the board of education of any school district, the board of control of any area vocational-technical school, and the board of trustees of any community college.*

Since K.S.A. 76-1001a and 76-1101a addresses the control of the KSSB and KSSD by the State Board of Education, the Petitioner also concludes that the teaching related positions at KSSB and KSSD are now tied into the definition of "Professional Employee" at K.S.A. 72-5413(c) and excluded from the definition of "public employee" under PEERA. K.S.A. 75-4322(a) details the public employee exclusions from PEERA:

*"Public employee" means any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees. (Emphasis Added)*

In response to this revelation, the Presiding Officer set a status conference with the parties. In that call, KOSE was asked to respond to Petitioner's *Supplemental Memorandum*. Respondent did so, and, this matter being fully submitted, the presiding officer issues this Order.

## FINDINGS AND DISCUSSION

As noted above, both Petitioner and Respondent in their respective motions for summary judgment had stipulated that no material facts are in dispute and that judgment may be had as a matter of law. The familiar standard in Kansas for addressing a motion for summary judgment is as follows:

“Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.”

Jackson v. Thomas, 28 Kan. App. 2d 734, 735 (2001).

The result of granting Petitioners' motions for summary judgment would be to remove the KSSB and KSSD teaching-related positions from the units established in the July 13, 2007 unit determination final order in PERB Case No. 75-UD-1-2007. The basis for the motion, highly summarized, is that the teaching-related positions in these two State Board of Education institutions fall under the jurisdiction of the PNA, and not the PEERA, by operation of law signed into effect in April.

As a result of the enactment of Senate Bill No. 290 to modify the PNA at 72-5413(b), the State Board of Education is now a “board of education” as defined in K.S.A. 72-5413(b) and anyone employed by the State Board of Education in a professional, educational or instructional capacity is subject to the Professional Negotiations Act. Because certain of the employees at KSSB and KSSD in teaching-related positions no longer fall under the jurisdiction of PEERA,

the presiding officer finds and concludes that the Petitioners' *Motions for Summary Judgment* should be granted.

### CONCLUSION

After a careful review of the pleadings and arguments filed in this matter, and after due consideration of the parties' arguments and applicable law, it is the conclusion of the Presiding Officer that the Petitioners' *Motions for Summary Judgment* in the above-captioned matters must be, and is hereby, granted, and that the Respondent's *Motion for Summary Judgment* is hereby denied. The Presiding Officer also finds that the above-described positions at KSSB and KSSD are to be removed from the statewide realigned PERB Unit 2 (Administrative Support) and PERB Unit 4 (Social Services, Counseling and Teachers). In order to accomplish this task, the Department of Administration is directed to work with PERB administrative staff to prepare and submit to the PERB proposed unit descriptions modifying statewide Units 2 and 4 as herein directed. Such modified unit descriptions shall include positions specified by class title, job code and agency, and be submitted to PERB within 60 days of the date of this Order. Such proposed unit descriptions will be circulated to the parties for their response and will thereafter be incorporated into an Initial Order issued in due course.

**IT IS SO ORDERED.**

Dated this 15th day of May, 2009.

  
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Douglas A. Hager, Presiding Officer  
PERB and Office of Labor Relations  
427 SW Topeka Blvd.  
Topeka, Kansas 66603-3182  
(785) 368-6224

### CERTIFICATE OF SERVICE

I, Sharon L. Tunstall, Administrative Officer, Kansas Department of Labor, hereby certify that on the 15<sup>th</sup> day of May, 2009, a true and correct copy of the above and foregoing Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

Rebecca Proctor, Attorney at Law  
James R. "Dick" Waers, Attorney at Law  
Blake & Uhlig, P.A.  
753 State Avenue  
Kansas City, KS 66101  
*Attorneys for Respondent*

Steven R. Smith, Attorney at Law  
Gates, Shields & Ferguson .  
10990 Quivira, Ste. 200  
Overland Park, KS 66210  
*Attorney for Petitioner*

Jane Carter, Executive Director  
KOSE, AFT/AFSCME, AFL-CIO  
1301 SW Topeka Blvd.  
Topeka, KS 66612

Michael Artz, Associate General Counsel  
AFSCME, AFL-CIO  
1101 17th Street NW, Suite 900  
Washington, D.C. 20036

Teresa Idris, General Counsel  
American Federation of Teachers, AFL-CIO  
555 New Jersey Ave., NW  
Washington, D.C. 20001

Deanna Lieber, General Counsel  
Kansas Department of Education  
120 SE 10th Street  
Topeka, KS 66612

Lisa Ochs, President  
KOSE, AFT/AFSCME, AFL-CIO  
1301 SW Topeka Blvd.  
Topeka, KS 66612

  
Sharon L. Tunstall, Administrative Officer